S.Ct. No. 86739

IN THE
MISSOURI SUPREME COURT

MICHAEL COYLE,

Respondent,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Appellant.

Appeal from the Circuit Court of
Platte County, Missouri, Division 5
The Honorable Gary Witt, Judge

SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Platte County, Missouri, Division 5, the Honorable Gary Witt, Judge. Transfer of this appeal was ordered by this Court pursuant to Rule 83.03 after an opinion by the Missouri Court of Appeals, Western District. Therefore, this Court has jurisdiction of this appeal pursuant to Mo. Const. Art. V, § 10, as amended effective November 2, 1982.

STATEMENT OF FACTS

Respondent's driving privilege was suspended pursuant to § 302.500, *et seq*. RSMo 2000, and he filed a petition for trial de novo in the court below on February 28, 2001 (LF 3-5). The cause was originally heard on August 16, 2001 which resulted in a judgment for Respondent (LF 37). This judgment was reversed by the Missouri Court of Appeals, Western District, in ***Coyle v. Director of Revenue,*** 88 S.W.3d 887 (Mo.App.W.D. 2002) (***Coyle I***), and the cause remanded to give Respondent the opportunity to put on evidence.

The cause was heard again on July 17, 2003, and Christine Silva of the Department of Health and Senior Services was called by Respondent (TR 7). She testified as to the software changes made to the DataMaster addressed in ***Coyle (I)*** (TR 11-37, 56-57, 60-61). She also testified about whether requiring subjects submit to two breath tests would produce more accurate results (TR 38-55, 57-60, 66-67).

Respondent testified about some of the field sobriety tests and his ensuing arrest (TR 68-72). He testified that once he was placed under arrest, he was placed in the

back of the patrol car (TR 72). He further testified that the trooper then asked him if he thought his wife could drive his car, and that the trooper then went and spoke to his wife (TR 73). He also testified that he could hear the conversation between his wife and the trooper, and that she took a preliminary breath test (TR 73).

Respondent testified that the trooper subsequently placed his wife in the front seat of the patrol vehicle, and then moved his vehicle 35 to 50 feet to the corner of the parking lot (TR 74). He further testified that it was "6 or 7 minutes, maybe" between the time he was placed in the patrol car until the time the trooper rejoined him in the vehicle and drove him to the police station (TR 74).

Respondent's wife testified that the trooper came up to her while she was sitting in the vehicle and asked if she would be comfortable driving (TR 79-80). She further testified that she was nervous at the time and told him "no" (TR 80). She also testified that he then walked her back to the patrol car, and then moved her car about 50 feet (TR 80). She also indicated that "Roughly ... 5 or 6 minutes" elapsed between when the trooper first came up to her in the vehicle and when he subsequently got into the patrol vehicle with her and her husband (TR 81).

Corporal Brenton testified on behalf of Appellant that he used his wristwatch to time the observation of Respondent, and that it did not necessarily correspond with the time reflected on the breath test printout (TR 84). He further testified that Respondent did not smoke or vomit, and that there was no oral intake of any material, in the 15 minutes immediately prior to the breath test (TR 84).

Brenton testified on cross-examination that he put Respondent in the front seat of his patrol car, rather than the back, since it did not have a cage and it would be unsafe to put somebody behind him (TR 85). He further testified that he gave Respondent's wife a "PBT" to determine if it was safe for her to drive, and she was then placed in his car with Respondent while he secured their vehicle (TR 87-90).

Brenton testified on re-direct examination that the result of Respondent's breath test was .137 (TR 91). He further testified that most of the times reflected on his report were from his watch, but that the breath test instrument was not calibrated to his watch (TR 92).

At the close of the evidence, the court took the matter under advisement (TR 105). Trial briefs were filed by the parties (LF 72-83), and on September 15, 2003, the Honorable Gary D. Witt, Judge, entered a judgment reinstating Respondent's driving privilege (LF 91-93, App. A1-3). In particular, the court made note of the issues concerning the software changes and whether multiple breath tests should be obtained from subjects, but concluded that these issues need not be addressed since the evidence established that Cpl. Brenton did not comply with the observation period requirement (LF 92-93; App. A2-3). This appeal ensued.

POINT RELIED ON

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT'S DRIVING PRIVILEGE BECAUSE THE SUSPENSION WAS PROPER, IN THAT APPELLANT ESTABLISHED A *PRIMA FACIE* CASE WHICH RESPONDENT FAILED TO REBUT, AND RESPONDENT NEITHER OBJECTED TO THE TEST RESULTS ON THE GROUNDS THAT THE OBSERVATION PERIOD WAS DEFECTIVE NOR ADDUCED EVIDENCE THAT HE ENGAGED IN ANY PROSCRIBED CONDUCT DURING THE 15 MINUTES PRIOR TO THE TEST.

Carr v Director of Revenue, 95 S.W.3d 121 (Mo.App.W.D. 2002);

Coyle v. Director of Revenue, 88 S.W.3d 887 (Mo.App.W.D. 2002);

Krieger v. Director of Revenue, 14 S.W.3d 697 (Mo.App.E.D. 2000);

Reinert v. Director of Revenue, 894 S.W.2d 162 (Mo.banc 1995);

§ 302.505, RSMo 2000;

§ 577.020, RSMo Supp. 2003;

19 CSR 25-30.060;

Rule 84.14.

ARGUMENT

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT'S DRIVING PRIVILEGE BECAUSE THE SUSPENSION WAS PROPER, IN THAT APPELLANT ESTABLISHED A *PRIMA FACIE* CASE WHICH RESPONDENT FAILED TO REBUT, AND RESPONDENT NEITHER OBJECTED TO THE TEST RESULTS ON THE GROUNDS THAT THE OBSERVATION PERIOD WAS DEFECTIVE NOR ADDUCED EVIDENCE THAT HE ENGAGED IN ANY PROSCRIBED CONDUCT DURING THE 15 MINUTES PRIOR TO THE TEST.

In reviewing this court-tried case, this Court is to sustain the judgment of the court below unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, and/or it erroneously applies the law. ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo.banc 1976). Here, the court below erroneously applied the law, and its judgment is unsupported by the evidence.

In a case under § 302.505, RSMo 2000, Appellant was required to establish:

> (1) the driver was arrested on probable cause that he or she was committing an alcohol-related driving offense, and (2) the driver had been driving at a time when his or her blood

alcohol concentration was at least .10 percent by weight.

House v. Director of Revenue, 997 S.W.2d 135, 138 (Mo.App.S.D. 1999).[1] In ***Coyle (I)***, it was held that Appellant had established a *prima facie* case and remanded the cause for Respondent to present rebuttal evidence. ***Id.*** at 896.

In particular, it was found in ***Coyle (I)*** that Respondent had presented evidence which "may, arguably, have established some doubt as to the validity" of the walk-and-turn and one-leg stand tests. ***Id.*** at 893-894. However, it was held that the remaining indicia of intoxication, including Respondent's bloodshot and glassy eyes, dilated pupils, slurred speech, the odor of alcohol on his breath and his swaying were sufficient to establish probable cause. ***Id.*** at 894.

The only additional evidence Respondent adduced on remand concerning the "probable cause" issue was that he had an eye disease which caused his eyes to appear glassy (TR 70-71). However, there was no evidence that Respondent explained this to the trooper at any point prior to the arrest, and therefore there would be no basis to find that the trooper could not rely upon Respondent's glassy eyes as an indicia of

[1] Respondent's arrest in this matter occurred prior to the lowering of the BAC level to .08%. The issues otherwise remain unchanged under the current statute.

intoxication, even if there was another explanation for the condition. Cf. ***Soest v. Director of Revenue***, 62 S.W.3d 619, 621 (Mo.App.E.D. 2001) (subject told officer before the field sobriety tests that she could not perform the walk-and-turn and one-leg stand tests because she had bad knees, and therefore the trial court could find that the officer could not rely on those tests when determining probable cause).

While the court below did not make any specific findings on the probable cause issue in either proceeding, Appellant submits that even assuming *arguendo* that the court believed Respondent's claims, the uncontroverted evidence was still sufficient to establish probable cause. ***Reinert v. Director of Revenue***, 894 S.W.2d 162, 164 (Mo.banc 1995). As such, Appellant submits that she met her burden of proof on this issue. ***Coyle, supra,*** 88 S.W.3d at 894.

Concerning the "BAC" issue, the court below specifically found:

> ... The Court finds that the Petitioner was arrested at 1:05 a.m. and that the breathalyzer test was given to the Petitioner at 1:22 a.m. During that 17 minute period the Trooper placed the Petitioner in his patrol car and a few minutes later left him alone, while the Trooper returned to the Petitioner's automobile to speak with the Petitioner's wife. The Trooper then moved the Petitioner's vehicle to another spot in the parking lot so it would be safe and out of harms way. The Trooper returned to the Patrol car a

> minimum of five minutes. During this time, the Petitioner was out of his sight.
>
> ... The Court is bound by the holding of Carr v. Director of Revenue, 95 S.W.3d 121 (Mo App 2003). If the trial court determines that the fifteen minute observation period was not complied with, no further evidence is needed to rebut the Director's prima facie case.... (sic).

(LF 92-93, App. A2-3).

It should first be noted that the finding concerning Petitioner being out of the corporal's sight for a "minimum of five minutes" is wholly unsupported by the record; Respondent's own testimony was that the corporal was close enough to be overheard while speaking to Respondent's wife at Respondent's vehicle, and he was able to observe her taking a preliminary breath test (TR 73). While the evidence also indicates that the corporal then moved Respondent's vehicle some distance away (TR 74, 79-80), there was never any claim that Respondent was out of the corporal's sight during this time.

Regardless, Respondent waived any putative defect in the observation period by failing to object on such grounds to the admission of the breath test result, either at the initial trial (App. A21-22) or in the instant proceeding (TR 91). Candidates for a breath test are required to be observed for 15 minutes prior to the test pursuant to 19 CSR 25-

30.060, in order to ensure that there is no smoking, oral intake or vomiting within that time period (App. A20). This requirement is intended to ensure that any alcohol in the mouth has time to dissipate (***Hill v. Director of Revenue,*** 985 S.W.2d 824, 828 [Mo.App.W.D. 1998]), as well as to "seek to keep out smoke and such `oral intake' which would tend to taint a test result or would prevent the mechanical operation of the breathalyzer machine." ***Farr v. Director of Revenue,*** 914 S.W.2d 38, 40 (Mo.App.S.D. 1996).

However, compliance with the Department of Health's regulations is a ***foundational*** element for introduction of a breath test result. ***Hansen v. Director of Revenue,*** 22 S.W.3d 770, 773 (Mo.App.E.D. 2000).[2] It has specifically been held:

> Proof of the above foundational requirements for admission of the test results is wholly unnecessary, however, where the results are admitted into evidence without objection. ... When evidence of the test results is admitted without objection, the party against whom it is offered waives any objection to the evidence, and it may

[2]Overruled by ***Verdoorn v. Director of Revenue,*** 119 S.W.3d 543, 547 (Mo.banc 2003) to the extent that it did not apply standard announced therein.

> be considered even if the evidence would have been excluded upon a proper objection.

Sullivan v. Director of Revenue, 980 S.W.2d 339, 341 (Mo.App.S.D. 1998) citing ***Reinert, supra***, 894 S.W.2d at 164; ***Sellenriek v. Director of Revenue***, 829 S.W.2d 338, 341 (Mo.banc 1992). See also, ***Tidwell v. Director of Revenue***, 931 S.W.2d 488, 491 (Mo.App.S.D. 1996). Here, Respondent raised no objection to the admission of either the testimony or the documents reflecting the test result at either proceeding on the grounds that there had not been a proper observation period (TR 91, App. A21-22; LF 20-22, App. A7-9).

This scenario was addressed in ***Krieger v. Director of Revenue,*** 14 S.W.3d 697 (Mo.App.E.D. 2000), where there was a discrepancy between the time reflected on the breath test printout and the clock used to time the observation period. ***Id.*** at 700. However, the only objection raised to the admission of the test result pertained to the maintenance of the instrument. ***Id.***

It was held that the subject made neither a proper nor timely objection to the test result such as would necessitate proving up the foundational issue of the observation period. ***Id.*** at 702. It was held in particular:

> ...(T)he breath test result should have been admitted, even if it could have been excluded by a proper objection. Absent a proper objection on this ground, any alleged

> deficiency in Director's compliance with the foundational requirement does not destroy the sufficiency of his case.

Id., citing ***Reed v. Director of Revenue***, 834 S.W.2d 834, 836 (Mo.App.E.D. 1992) and ***Sellenriek, supra***, 829 S.W.2d at 341. See also, ***Middlemas v. Director of Revenue,*** 159 S.W.3d 515, 521 (Mo.App.S.D. 2005); ***Weber v. Director of Revenue,*** 137 S.W.3d 563, 566-567 (Mo.App.S.D. 2004); ***Duing v. Director of Revenue,*** 59 S.W.3d 537, 539 (Mo.App.E.D. 2001).

Here, however, the court below relied upon ***Carr v. Director of Revenue***, 95 S.W.3d 121 (Mo.App.W.D. 2002) for the proposition: "If the trial court determines that the fifteen minute observation period was not complied with, no further evidence is needed to rebut the Director's prima facie case...." (LF 93, App. A3). However, review of the holding in ***Carr*** reflects that the trial court's reliance is misplaced.

There, the subject claimed that he was outside of the officer's presence during the 15 minutes preceding the test, during which time he smoked and ate a piece of candy. ***Id.*** at 122. Appellant argued that in lieu of having objected to the test result, the subject had to prove that his conduct actually affected the test result, but it was ultimately concluded that no further evidence was needed to rebut Appellant's *prima facie* case. ***Id.*** at 130.

Here, Respondent did ***not*** raise an objection pertaining to the observation period when the test results were offered, he did ***not*** adduce evidence that he was actually out

of the corporal's presence within the 15 minutes preceding the test, and -- most importantly -- he did ***not*** adduce evidence that he actually did anything proscribed by the regulation during the 15 minutes preceding the test. Rather, the only source of controversy here was that the corporal's report reflects he arrested Respondent at 1:05 a.m. (LF 18, App. A5), while the printout from the breath test indicated the test was at 1:22 a.m., 17 minutes later (LF 22, App. A9).

However, the corporal testified that he used his watch to time the observation period, that it did not necessarily correspond with the time reflected on the breath test printout (TR 84), that he used his watch for the times reflected on the report, and that the breath test instrument was not calibrated to his watch (TR 92). There is certainly no basis to conclude that his watch would be coordinated with the Riverside Police Department's breath analyzer, or that the Riverside Police Department would coordinate their breath analyzer with a highway patrolman's watch.

The "failure to synchronize the various time pieces" has previously been characterized as a "benign explanation" for a discrepancy in an arrest report between the time reflected on a breath analyzer's printout and other times reflected on the report. ***Hinton v. Director of Revenue,*** 990 S.W.2d 207, 209 (Mo.App.W.D. 1999). The evidence that Respondent did not smoke, vomit or have any oral intake in the 15 minutes immediately prior to the breath test was otherwise uncontroverted; the corporal testified that Respondent did not smoke or vomit, and that there was no oral intake of any material, in the 15 minutes immediately prior to the breath test (TR 84), and

Respondent did not controvert this testimony. Rather, his evidence merely indicated that he was not in the corporal's presence for some period of time between his arrest and the test; it did ***not*** indicate that this was actually within 15 minutes of the test, or that he did anything proscribed by the regulation during this time.

Historically, it has been held in this state (and others) that breath test results were admissible under circumstances such as were present in the case at bar, even when there was a proper and timely objection. It has been held: "The mere assertion that ingestion was hypothetically possible ought not to vitiate to observation period foundational fact so as to render the breathalyzer test results inadmissible." ***State v. Wyssman,*** 696 S.W.2d 846, 848 (Mo.App.W.D. 1985), quoting ***Wester v. State,*** 528 P.2d 1179, 1185 (Alaska 1974). It was concluded: "In order to defeat the test on that ground, it is necessary that evidence be adduced that one of the acts contemplated by the rule occurred." ***Id.***

In a similar vein, it has been recognized that technical noncompliance with the foundational requirements does not render the test result inadmissible where the evidence otherwise reflects that the accuracy of the test was not compromised. See, ***Hansen, supra,*** 22 S.W.3d at 773. There, the evidence reflected that the subject had been observed for 15 minutes prior to the first attempt at a breath test, but there was a six minute gap before the second attempt which produced the test result in question, during which time the subject was not observed. ***Id***. at 774. The Eastern District held

that the subject offering no evidence that she engaged in any activities proscribed by the regulation supported an inference that she did not engage in any of the conduct which would void the test. ***Id***.

It was further held that when determining whether the 15-minute rule has been satisfied, the courts should focus on the rule's purpose, more than concerns about "rote procedure" and concluded: "When the record shows that the purpose of the 15-minute observation period is fulfilled, courts admit the test results." ***Id***. See also, ***McKown v. Director of Revenue,*** 908 S.W.2d 178, 179 (Mo.App.W.D. 1995); ***Daniels v. Director of Revenue,*** 48 S.W.3d 42, 45 (Mo.App.S.D. 2001).[3] Here, the record supports no conclusion but that the purpose of the rule was fulfilled; there is simply no evidence from which it could be found that Respondent smoked, vomited and/or had any oral intake in the 15 minutes before the test.

Other jurisdictions have also recognized that even where there is a putative defect in the observation period, it is still incumbent on the subject to show that something was actually done to affect the test result. In particular:

> ...A slight interruption of the observation period or a less than perfect observation does not invalidate the test unless the driver has ingested or regurgitated a substance that

[3]***Ibid***.

> affects the results, and the burden is on the driver to present such evidence. ... The argument that something *may have occurred* during observation to affect the test result is speculation and should not be used without supporting evidence as the basis for rescinding a revocation. ...
>
> ...Respondent did not meet his burden of introducing evidence that something happened during the observation period which colored the reliability of the test results....

(Emphasis in the original; citations omitted.) ***Falaas v. Commissioner of Public Safety,*** 388 N.W.2d 40, 42 (Minn.App. 1986). See also, ***State v. Nelson,*** 399 N.W.2d 629, 632 (Minn.App. 1987); ***Melin v. Commissioner of Public Safety,*** 384 N.W.2d 474, 476 (Minn.App. 1986).

It has also been held:

> The only issue ... was whether the requirement that the defendant be observed for a period of twenty minutes was complied with by the operator. Defendant argues that this gives rise to the possibility that he could have taken foreign matter into his mouth less than twenty minutes before the test. We cannot conjecture as to what the defendant did.... He never offered any evidence as to what

happened.

State v. Brown, 359 N.E.2d 706, 708 (Ohio App. 1975).

Moreover, in ***Daniels, supra,*** 48 S.W.3d at 44, there was a two to three-minute gap in the observation period when the officer searched the subject's car while the subject was seated in the patrol car. However, the subject admitted that he did not do anything proscribed by the regulation during this time, and it was held that the purpose of the regulation had been satisfied. ***Id***. at 44-45. See also, ***Holley v. Lohman***, 977 S.W.2d 310, 312 (Mo.App.S.D. 1998) (claims of a defective observation period deemed irrelevant where subject admitted he did not engage in proscribed conduct during that time).

Of course, ***Daniels*** and ***Holley*** are distinguishable to the extent that Respondent here did not expressly admit that he did not do anything proscribed by the regulations during the 15 minutes preceding the test. However, he did not claim that he engaged in any such conduct, either.

It has previously been held that a subject's failure to testify "raises the presumption that anything she might have said would have been unfavorable to her." ***McCarthy v. Director of Revenue,*** 120 S.W.3d 760, 763 (Mo.App.E.D. 2003), citing ***Smith v. Director of Revenue,*** 77 S.W.3d 120, 122 (Mo.App.W.D. 2002). In ***Smith,*** this Court noted that in a civil case, Appellant is free to draw inferences from the petitioner's failure to present evidence when establishing her *prima facie* case. In

particular,

> ...It is well settled that the failure of a party having knowledge of facts and circumstances vitally affecting the issues on trial to testify in his own behalf ... raises a strong presumption that testimony would have been unfavorable and damaging to the party who fails to proffer same.

Id. at fn. 3, quoting ***Stringer v. Reed***, 544 S.W.2d 69, 74 (Mo.App.S.D. 1976) and ***Bean v. Riddle***, 423 S.W.2d 709, 720 (Mo. 1968).

Appellant submits that the same rationale applies here, where both Respondent and his wife testified, but neither claimed that he engaged in any proscribed conduct while out of the corporal's presence, much less within 15 minutes of the test. Indeed, having otherwise testified in detail about the events leading up to the test, the failure to make any such claims would appear to give rise to an even stronger inference that Respondent did not engage in any such conduct.

The only claim that Respondent made was that he was burping or belching throughout the course of the evening (TR 76), but he never claimed to have done so during the 15 minutes preceding the test, and this conduct is not otherwise proscribed by the regulation anyhow. ***Daniels, supra,*** 48 S.W.3d at 44. See also, ***State v. Pike,*** SC86083 (April 26, 2005) (subject chewing gum prior to onset of observation period); ***Duing, supra,*** 59 S.W.3d at 539 (subject chewing tobacco prior to onset of observation period).

Here, even if Respondent's failure to testify that he did something proscribed by the regulation is not viewed as tantamount to an admission that he did nothing proscribed by the regulations during the 15 minutes preceding the test (***Holley, supra***, 977 S.W.2d at 312), his failure to testify otherwise "can be considered in measuring the credibility or probative force of the evidence presented" (***Smith, supra,*** 77 S.W.3d at 122) which reflects that he was properly observed and did nothing proscribed by the regulations during the 15 minutes preceding the test.

While the trial court is free to rely on inferences from the evidence, such inferences "must be reasonable in nature, and the trial court cannot rely on guesswork, conjecture and speculation." ***Testerman v. Director of Revenue,*** 31 S.W.3d 473, 483 (Mo.App.W.D. 2000)[4]. It would be sheer guesswork, conjecture and speculation for the trial court to conclude that Respondent did something proscribed by the regulations within 15 minutes of the test, despite his failure to so claim.

Moreover, where the evidence on an issue is uncontroverted, any holding contrary to such evidence cannot stand as being unsupported by the evidence. ***Reinert, supra***, 894 S.W.2d at 164. Here, the evidence that the corporal used his watch to time the observation period, and that Respondent did nothing during the observation period

[4]***Ibid***.

proscribed by the regulations, was uncontroverted.

Regardless, the preceding discussion is largely a tempest in a teapot by virtue of Respondent's failure to object to the introduction of the test result in the first place. While there is no disputing the "critical role" the observation period plays in the accuracy of a breath test (***Carr, supra***, 95 S.W.3d 129), it remains a ***foundational*** element to the introduction of the test result -- proof of which the subject can waive by failing to object. In addition to the specific holding in ***Krieger*** that proof of the observation period is waived by the failure to make a proper and timely objection, it can hardly be held that the observation period is any more critical to the accuracy of the test than proof that the breath analyzer was working properly (***Reinert, supra,*** 894 S.W.2d at 163) or that a person drawing a blood sample is properly trained to do so. ***Smith, supra,*** 77 S.W.3d at 124 ("Notwithstanding our ignorance of these matters, requiring that paramedics be trained in proper procedures for withdrawing blood so as to keep it from becoming tainted seems to be significant...").

Moreover, it is clear that what is critical to the accuracy of the test is whether the subject actually does something proscribed by the regulation; the mere act of someone looking at the subject does not affect the accuracy of the test. A subject who is totally isolated with a supply of liquor and cigarettes for the entire 15 minutes preceding the test, but who does not partake of either, will produce a perfectly reliable test result. A subject who is studied minutely by scores of officers for the entire time,

but somehow manages through some act of legerdemain to ingest alcohol, undetected, immediately prior to the test will produce an unreliable test result.

It is quite clear under the line of cases from ***Sellenriek*** on forward that when a test result is introduced without a proper and timely objection that it can properly be considered, even if it would have been excluded upon a proper and timely objection. Further, there was simply no testimony from Respondent to support even a reasonable inference that he either was not observed for 15 minutes prior to the test or that he engaged in some proscribed conduct during this time.

It has been noted,

> ...[t]o rebut a *prima facie* case for suspension or revocation under section 302.505, the driver is required to present specific evidence; merely pointing out inconsistencies in the Director's case is insufficient.

Carr, supra, 95 S.W.3d 125-126, quoting ***Testerman, supra,*** 31 S.W.3d at 480. Here, all Respondent did was merely point out an inconsistency in Appellant's case -- the time of the breath test reflected on the test strip compared to the time of the arrest reflected on the report. It would be sheer guesswork, conjecture and speculation for the trial court to conclude that, despite the officer's explicit testimony and Respondent's failure to claim otherwise, that Respondent was not observed for 15 minutes and/or did something proscribed by the regulations. ***Id.*** at 483.

It is also noted that the court below further raised issues concerning the software

change to the DataMaster, and whether multiple breath tests should be obtained from subjects (LF 92-93; App. A2-3). In particular, the court noted that "Ms. Silva stated that the changes to the software had no effect on the chemical testing process, but absent adequate testing, there is no way the Court can be sure of this assertion" (LF 92, App. A2).

Appellant submits that the record here does reflect "adequate testing," to wit: the maintenance check completed one week prior to Respondent's test which reflects the instrument produced three readings of .099% when checked with a .100% solution (LF 23, App. A10). It needs to be remembered that, all the bells and whistles notwithstanding, the ultimate purpose of the DataMaster is to determine a subject's BAC, and the DataMaster at issue here was doing so well within the +/- .005% tolerance set by the Department of Health. ***Coyle (I), supra,*** 88 S.W.3d at 896.

Concerning the issue of whether two tests should be required, the court below noted that "Scientific evidence is admissible if it has received general acceptance in the relevant scientific community" citing ***State v. Hill,*** 865 S.W.2d 702 (Mo.App.W.D. 1993). However, the court overlooked the fact that admissibility of breath test results in Missouri is established by statute, not common law foundation.

In particular, § 577.020.3, RSMo Supp. 2003, provides that testing shall be done according to the methods and techniques prescribed by the Department of Health, and it has long been held that these provisions are a statutory substitute for a common law foundation. ***State v. Sinclair,*** 474 S.W.2d 865, 868 (Mo.App.S.D. 1971); ***State v. Paul,***

437 S.W.2d 98, 102-103 (Mo.App.E.D. 1969). Further, nothing in either the regulations or the statutes authorizes or requires multiple breath tests be administered to subjects, and there is no precedent in Missouri case law for not accepting a single test where there is no evidence that something was wrong with either the subject or the equipment. See, e.g., ***Robison v. Director of Revenue***, 837 S.W.2d 42-43 (Mo.App.W.D. 1992).

While § 577.020.2, RSMo Supp. 2003, does provide that subjects can be required to submit to two tests, this section has been construed to merely allow two of the types of tests allowed by the statute. ***Snow v. Director of Revenue,*** 935 S.W.2d 383, 386 (Mo.App.S.D. 1996). Nothing in the statute provides for situations where a subject submits to the first breath test, but then refuses the second, or situations where an officer wants a second test of a different type to check for drugs in addition to a breath test for alcohol. See, e.g., ***Wilson v. Director of Revenue,*** 35 S.W.3d 923, 927 (Mo.App.W.D. 2001); ***Duffy v. Director of Revenue,*** 966 S.W.2d 372, 381-382 (Mo.App.W.D. 1998) (subjects revoked for refusing urine tests after breath tests).

In a nutshell, none of the evidence adduced by Respondent raised "a genuine issue of fact regarding the validity of the blood alcohol test results." ***Verdoorn, supra,*** 119 S.W.3d at 546. As such, he failed to meet his burden of rebutting Appellant's *prima facie* case. ***Coyle (I), supra,*** 88 S.W.3d at 896.

The court below erroneously applied the law by setting aside Respondent's

suspension, and its judgment is unsupported by the evidence. Therefore, its judgment should be reversed. ***Murphy, supra***, 536 S.W.2d at 32.

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that the judgment of the court below be reversed, and that this Court enter the judgment which should have been entered sustaining the suspension of Respondent's driving privilege. Rule 84.14.

Respectfully submitted,

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CERTIFICATION OF Substitute BRIEF

COMES NOW Appellant by the undersigned counsel and certifies that this brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for Substitute Brief is 5307 words, as calculated by the word count of the word-processing system used to prepare this brief.

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CERTIFICATION OF SCANNED DISK

COMES NOW Appellant by the undersigned counsel and certifies that this disk containing Substitute Brief has been scanned for viruses and it is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing was mailed, postage prepaid, 17th day of June, 2005, to:

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